

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EDWARD BYRD,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 200355

Livingston Circuit Court

LC No. 95-008878 FH

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a).¹ The trial court sentenced defendant to three concurrent terms of five to fifteen years' imprisonment. We affirm.

I

Defendant contends that the trial court gave an improper *Allen*² instruction after the jury notified the court that it had reached an impasse. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998).

In *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974), the Supreme Court adopted the American Bar Association's Minimum Standard for Criminal Justice 5.4. An instruction that departs from the ABA standard jury instruction 5.4 will constitute error requiring reversal only where it has an undue tendency of coercion. *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984). To determine whether an Allen instruction has a coercive influence on the jury, the charge must be examined in the factual context in which it was given. *Id.* at 315.

In the present case, defendant claims that the instruction was coercive because it was given shortly after the jury had listened to the complainant's testimony again. Defendant further contends that the trial court's statement, "You've had the opportunity to re-listen to testimony,"

implied that the court wanted the jury to find defendant guilty. We disagree. The videotaped testimony of the complainant was replayed to the jury at its own request. The timing of the instruction was controlled solely by the timing of the jury's declaration that it had reached an impasse, which occurred approximately forty-five minutes after the complainant's testimony was replayed. Contrary to defendant's argument, the trial court's statement that the jury had had the opportunity to hear some testimony again did not imply that it favored a particular verdict. Finally, after reviewing the trial court's instruction, we cannot find that it was unduly coercive. In its instruction, which was substantially similar to CJI2d 3.12, the court encouraged the jurors to listen to their fellow jurors, but stated that no juror should give up an honest belief for the sake of reaching agreement. See *Hardin, supra* at 316. We conclude that the instruction sufficiently protected defendant's rights, and reversal is therefore not required. See *Whitney, supra*.

II

Defendant next asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant contends that trial counsel was ineffective because he elicited evidence from a police officer that the complainant had described acts of intercourse in addition to those which defendant had been charged. Moreover, counsel mentioned the number of sexual acts alleged by the complainant several times during closing argument. After reviewing the record, we conclude that defendant has failed to establish that counsel was not pursuing a sound trial strategy. See *id.* Defense counsel was obviously attempting to challenge the complainant's credibility by demonstrating that the extent of the sexual activity she described was unlikely to have occurred without discovery by defendant's wife and without resulting in knowledge of defendant's intimate physical characteristics which the complainant did not display. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 309; 581 NW2d 753 (1998).

III

Finally, defendant claims that the trial court improperly scored offense variable (OV) 7, OV 12, OV 13, and OV 25. However, defendant has failed to present a legally cognizable claim. A putative error in the scoring of sentencing guidelines is not a basis upon which an appellate court can grant relief. *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998); *People v*

Mitchell, 454 Mich 145, 175-178; 560 NW2d 600 (1997).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

¹ The jury also convicted defendant of two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a); however, a directed verdict of acquittal was later entered on these counts.

² *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).